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Testimony

Before the Committee on Resources

United States House of Representatives

Hearing on HR (Ken Calvert),

the Water Supply, Reliability and Environmental Impact Act

and HR 2641, to Authorize the Secretary of the Interior

to Implement the Calfed Bay-Delta Program

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Mr. Chairman and members of the Subcommittee, my name is Stuart L. Somach. I am an attorney with the law firm of Somach, Simmons & Dunn, located in Sacramento, California. We represent clients in California, Oregon, Nevada and Arizona on a variety of issues and matters, including those involving water and the environment. I have testified before this committee, and other House and Senate committees, on numerous issues and legislation, including hearings dealing with the Coordinated Operations Agreement, the

Endangered Species Act, the Central Valley Project Improvement Act, and on prior versions of proposed CALFED legislation. I have read and am familiar with both bills under consideration here as well as with the CALFED Record of Decision. I have followed CALFED actions and activities closely since August 28, 2000.

Among my clients are entities and individuals within Northern California. I am, for example, General Counsel for the Glenn-Colusa Irrigation District, the largest irrigation district in Northern California with the most senior water rights on the Sacramento River, and am Special Legal Counsel for the County of Sacramento and the Sacramento County Water Agency, the largest urban area within the central portion of Northern California. With this representation in mind, I first offer some context for my testimony.

From the very beginning of the CALFED process, indeed, before the Record of Decision was issued, Northern California interests have been fairly clear that, in general, we were not responsible, in fact or in law, for the problems that exist in the Bay-Delta. In our view, those problems were created by others. As a consequence, we can only support solutions that solve problems in a manner that does not harm Northern California interests. We cannot support and will oppose solutions that seek to solve problems created by others at the expense of Northern California.

I hasten to add that from the onset, Northern California has nonetheless been willing to work with CALFED to seek solutions that meet the test of no redirected adverse impacts while advancing substantially actions and programs that would improve the Bay-Delta. We are still willing to participate in these programs and, in fact, have initiated actions that, when completed, will substantially advance the CALFED goals.

With the foregoing in mind, I offer the following comments with respect to the draft legislation at issue.

HR (Calvert) - Title 11 - California Water Security and Environment Enhancement Act.

1. Balance (Sections 201(b)(3); (c)(4). Section 203(a)). The concept of "balance" is critical to a successful CALFED. H.R. (Calvert) deals with this issue by first stating in a clear and unambiguous manner that the CALFED program shall progress in a balanced manner and then provides specific direction on how this balance is to be evaluated and then achieved. Without these types of procedures there is little question in my mind that water supply storage and conveyance projects will lag behind other CALFED programs and

projects and, indeed, may never be completed. In particular, the provisions of Section 203(a)(1)(B), dealing with storage, and (H), dealing with permitting, are of critical importance.

2. Administration of Activities (Section 201(c)).

There has been a fairly large disconnect between the whole purpose and need for CALFED and the way regulatory agencies approach their missions.

The CALFED program is multi-dimensional in nature and not only evaluates, on a programmatic level, numerous alternative approaches but, in light of the significant water related problems at issue, in fact incorporates multiple elements which in the normal context might be considered, in themselves, as alternatives, one to the other. In other words, the problems dealt with by CALFED are so significant that looking at one option as if it were in opposition to another is counter-productive to meeting CALFED goals.

While all of the planning and actions associated with CALFED contemplate this integrated approach toward water management, regulatory agencies, particularly the United States Army Corps of Engineers and the Environmental Protection Agency, adhere to an overly rigid application of, for example, the Clean Water Act section 404(b)(1) alternatives analysis. This requires one to view each of the CALFED potential solutions not as an integrated whole, but rather as alternatives, one to the other. As a consequence, the ability to maximize benefits through full integrated water management is lost in favor of rigid analyses developed to deal with situations dissimilar to CALFED.

The law itself does not require this rigid application of regulatory standards. However, it probably requires specific congressional direction and guidance (contemplated in existing law) to make certain that regulatory review occurs in an appropriate fashion. Section 201(c) provides this necessary direction and insures that CALFED's quest for a fully integrated water management solution will not be hampered by an overly rigid regulatory mind-set. This goal might be further advanced through additional language such as the following:

Alternatives Analysis

Pursuant to the provisions of 33 U.S.C. § 1344(r), information of the effects, if any, of a discharge of dredged or fill material, including consideration of the guidelines developed under 33 U.S.C. § 1344(b)(1), will be included in the environmental impact statement

undertaken pursuant to the National Environmental Policy Act ("NEPA") for any CALFED project or program requiring federal authorization and such environmental impact statement will be submitted to Congress prior to the authorization of the project or the appropriation of funds for the construction of the project.

3. Water Storage (Section 201(d)(1)). New additional water storage will be critical to addressing and solving CALFED problems. To the extent that HR (Calvert) includes provisions advancing water storage, it, of course, advances this critical issue. Nonetheless, HR (Calvert) should be more specific with respect to water storage projects and should mirror the type of language that is utilized to authorize water conveyance projects.

We support a Sites Reservoir and believe that it should be specifically authorized and referenced within any CALFED Bill. Sites Reservoir will provide much needed storage and, consequently, a new water supply for California. However, in this context and specific to the congressional authorizations at issue here, we believe that a great mistake will be made and an opportunity will be lost if the feasibility of a storage project (like Sites) is viewed in a traditional fashion, with the "yield" of the reservoir merely divided up among a pre-identified group of "beneficiaries."

The ability to view Sites in a manner different from the traditional storage reservoir stems, in part, from its location within or adjacent to the Glenn-Colusa Irrigation District ("GCID") and districts within the Tehama-Colusa Canal Authority. Initially, this allows the reservoir to be filled through the conveyance of water into the reservoir pursuant to a wheeling agreement with GCID for use of GCID's Main Canal and/or potentially through a wheeling agreement with the United States Bureau of Reclamation ("USBR") or others for use of the Tehama-Colusa Canal.

In addition, how one operates Sites should take into consideration opportunities presented by the fact that it can be integrated with local interests within the Sacramento Valley so that it is operated and managed in conjunction with local interests' direct diversion water rights, other surface water resources, including storage rights within Shasta Reservoir, and groundwater resources. Proceeding with integrated water management will provide direct and indirect benefits. These direct and indirect benefits include securing independent, reliable and certain supplies of irrigation, municipal and industrial ("M&I") and environmental water of suitable quality for reasonable beneficial uses by local interests within the Sacramento Valley. They will also provide benefits to the environment, including improvements in Delta water quality, the availability of water for the Environmental Water Account ("EWA"), in management flexibility that will be made available in the Sacramento Valley, and a more dependable water supply for water users within the Delta as well as water users south of the Delta.

How this could work is perhaps best described by way of simple example:

GCID has 720,000 acre feet of senior direct diversion water rights and 105,000 acre feet of storage rights in Shasta Reservoir. It does not need any additional water and, of course, needs no water from Sites Reservoir. Nonetheless, in any given year it could assist others in maximizing the benefits that can be derived from Sites Reservoir. (The same is true with respect to some districts within the Tehama-Colusa Canal Authority.) This could occur in a number of ways.

In year "A," for example, there could be a need for greater cold water flows within the Sacramento River from Shasta. In this situation GCID and/or the Tehama-Colusa Canal Authority could forego taking all or some of its storage rights within Shasta in favor of taking warmer water from Sites Reservoir.

In year "B," for example, for whatever reason, it might be desirable for a period of time to avoid the diversion of any water from the Sacramento River. Again, for that period, GCID and/or the Tehama-Colusa Canal Authority could forego direct diversion from the Sacramento River in favor of diversion from Sites.

In year "C," a dry year, for example, it might be desirable, during critical months, to ask GCID and/or the Tehama-Colusa Canal Authority to utilize available groundwater, thereby allowing water within Sites, Shasta and the Sacramento River to be utilized for other purposes.

The ability to operate in a flexible manner to maximize system-wide benefits is not unique to GCID or the Tehama-Colusa Canal Authority; it is a shared ability that could be exercised by other entities within the Sacramento Valley. Sites Reservoir should be specifically authorized within the CALFED Bill.

4. Water Supply and Water Yield Study (Section 201(d)(1)(D)). This provision or something like it is long overdue. Moreover, its integration with existing authority and work already undertaken as part of the CVPIA should maximize efficiency. We, however, need to move past study and fulfill the CVPIA promise that lost yield would be recovered.

5. Water Transfers (Section 201(d)(4)). Northern California water entities are willing and

able to transfer water for beneficial use within the watershed of origin and elsewhere. In the past few years we have, for example, transferred water for agricultural use within the Westlands Water District and for urban use within the Metropolitan Water District of Southern California. We have also transferred water to the EWA.. This is in addition to local transfers to better match supply with demand within the Sacramento Valley. We have proven the benefits that can be achieved through transfers. Two things are necessary, however, to insure that transfers continue.

First, the various regulatory agencies must act in a manner that facilitates, rather than hampers, transfers. The Section 201(d)(4)(B) provision with respect to permit streamlining is a good start in this direction. More needs to be done.

Second, the underlying rights of those who transfer water must be honored. The transfer or refusal to transfer cannot be challenged through concepts of waste or beneficial use. A provision to this effect would make HR (Calvert) better.

6. Integrated Water Management (Section 201(d)(6)). Northern California has been at the forefront of integrated water management and supports the provisions of HR (Calvert) which advance this cause. In addition to the integrated water management concepts associated with Sites Reservoir, noted above, Northern California water interests have proceeded with Basin-wide Water Management Plans to maximize efficient use within the Sacramento Valley and have, in conjunction with the USBR, the Department of Water Resources, the United States Fish and Wildlife Service, the California Department of Fish and Game and various export water interests, developed an aggressive integrated water management program under the so-called "Phase 8" process.

Another example of a project that will benefit from these provisions of HR (Calvert) is the Freeport Regional Water Project, a joint project involving the East Bay Municipal Utility District, Sacramento County and the Sacramento County Water Agency. This project has the potential of providing substantial water quality benefits to the Bay Area while insuring local urban supplies within the Sacramento Valley, thus fulfilling multiple CALFED goals.

7. Management - Coordination (Section 202(a)).

A fundamental problem that was identified early in the San Francisco Bay-Delta Estuary process was the multiple statutory, regulatory and agency coverage (overlap) of critical issues. Indeed, the whole concept of CALFED was borne out of the unintended adverse consequences of uncoordinated activities conducted by multiple agencies seeking to

address the same problem.

In a critical way CALFED has, in fact, worked to focus attention on a coordinated set of goals and actions. Nonetheless, an important element still must be addressed. While agencies work, in part, within CALFED, at critical times they remove themselves from that process and retreat to their individual regulatory processes. Thus, critical CALFED programs and projects are still required to scale multiple, duplicative, regulatory processes which add costs and time to that which would otherwise be necessary and which consequently challenge the feasibility of any proposed project or program.

The solution, we believe, is not in asking any regulatory body to abrogate its responsibility to another or in the modification of any underlying statutory program. Instead, we propose a "regulatory streamlining" or "regulatory coordination" process in which all project elements or a program are evaluated at one time and, in this context, all regulatory requirements are also made known (along with mitigation measures) at one time. In this manner duplicative and/or inconsistent regulatory mandates can be immediately identified, evaluated and dealt with; and a project or program proponent can understand, at that time, what its total requirements/obligations will be. In this way intelligent decisions on how to proceed or how not to proceed can be made with the knowledge of all relevant facts.

This process is not unique. The Federal Power Act, 16 U.S.C. § 791a *et seq.*, provides for similar procedures associated with the licensing under that Act. Regulatory and other relevant agencies, under the provisions of the Electric Consumers Protection Act ("ECPA") are required to notify the Federal Energy Regulatory Commission ("FERC") and the project proponents of all of the regulatory conditions that must be included within a license. FERC, in turn, must include in any license issued under the Federal Power Act appropriate conditions based upon what is provided by those other regulatory agencies.

See 16 U.S.C. § 805j(1); *Mine Reclamation Corporation, et al. v. Federal Energy Regulatory Commission, et al.*, 30 Fed.3d 1519, 1525 (D.C. Cir. 1994). There is no absolute veto of any regulatory requirement, but merely an "all cards up" understanding of what will need to be done in order to proceed with a project.⁽¹⁾ Not only does this save a great deal of time, but it also allows the project proponents to make an intelligent business decision about whether and how to proceed. *Id.*

In our view, while a step in the right direction and clearly a good idea, Section 202(a) simply does not go far enough. Instead, we would propose language such as the following:

Regulatory Coordination

The Secretary working with the Governor shall develop a regulatory coordination and streamlining program in which all permits, licenses or other approvals associated with the permitting approval of projects under this Act will take place. This regulatory coordination or streamlining program shall insure that all Federal and California agencies' respective regulatory programs will take place at one time and that they will be coordinated in a manner that reduces or eliminates process- or substantive-related duplication and inconsistencies, thereby reducing costs and time that would otherwise be required; Provided, that nothing herein is intended nor should it be construed to affect the substantive regulatory requirements that may be applicable.

As in many situations, the problem faced by project proponents is not the need to comply with appropriate environmental obligations but the problem created by multiple, duplicate or inconsistent regulations. This problem is particularly troublesome in a situation as complex as the one presented by CALFED. The type of language proposed here, while not fully addressing all of the potential problems, will go a long way in remedying the situation that otherwise exists.

8. Beneficiaries Pay (Section 205(b)). There is, of course, a simple logic in the concept of beneficiaries pay. However, we must also guard against the abuse of the "beneficiary pays" provision of the CALFED Record of Decision being distorted by those who simply choose to utilize this provision as a means to block projects, including, for example, Sites Reservoir. It is not that identified beneficiaries should not shoulder appropriate financial responsibility, but that the rhetoric engendered by those currently repeating this beneficiary-pays mantra do so by constructing so-called rules or "principles" that reflect a very traditional view of project operation. In this traditional view, utilizing reservoir storage as an example, one would merely divide the yield of a reservoir among identified entities and individuals and thereby simply determine who and how much is to be paid by each of these entities and individuals. Proceeding in this manner precludes the ability to view projects in a non-traditional manner, thereby missing the opportunity to maximize its benefits.

Identification of "beneficiaries" will, of course, be more difficult if one varies from the traditional view of project operation and management. Indeed, rather than starting with the identification of beneficiaries, one would start from the perspective of identifying management scenarios that would maximize the operation of the entire Sacramento River system over a period of years. In this manner, system maximization, and not beneficiary identification, will drive future analysis. The results of this analysis will identify beneficiaries rather than having the identification of beneficiaries drive the analysis.

Beneficiaries, all beneficiaries, including the environment, should "pay" for benefits received from *all* CALFED projects or activities. This requirement should not be limited to storage and conveyance projects as asserted by some and, in this regard, the provisions of Section 205(b) are well stated. In this context, some further legislative directive with respect to this issue, including focusing on the difference between a "beneficiary" of a CALFED project and a "participant" would be helpful.

HR 2641 - Calfed Bay-Delta Authorization Act

HR 2641 contains many of the core provisions found in HR (Calvert). In this context, we have already commented on them above. This Bill has the specificity with respect to certain issues such as the specific reference to Sites Reservoir and other storage, as well as specific inclusion and reference to the Freeport Project at Section 3(c)(3)(I). These are positive provisions and should be carried forward in any final CALFED authorization legislation. However, we believe that other provisions of the Bill miss the point. As a consequence, we believe that HR (Calvert) is a far superior vehicle to authorize federal participation in CALFED.

Notwithstanding the foregoing and, in any event, because of Section 3(c)(3)(N), entities within the Sacramento Valley could never support HR 2641 and would oppose CALFED itself if HR 2641 were passed into law.

As noted at the start, the Sacramento Valley is willing to assist in seeking solutions to problems that have been caused by others within the Bay-Delta. We are, however, unwilling to do so if the solution is at our expense. HR 2641 somehow adopts the misguided notion that it is appropriate to hold hostage Bay-Delta solutions until federally mandated groundwater management is forced on the Sacramento Valley.

Proceeding in this manner is inappropriate. Moreover, it is not needed.

Section 3(c)(3)(N) is inappropriate because there already exists extensive state and local law to regulate and manage groundwater within California, including within the Sacramento Valley.

Section 3(c)(3)(N) is inappropriate because groundwater management is and should remain a matter of state and local law and should not be federalized.

Section 3(c)(3)(N) is not needed because groundwater within the Sacramento Valley is already being managed and does not suffer from overdraft as may exist elsewhere within the State.

Section 3(c)(3)(N) is not needed because entities within the Sacramento Valley are integrating groundwater in programs such as those discussed above in order to maximize the reasonable beneficial use of water to the benefit of those within the Sacramento Valley, the environment and to areas south of the Delta.

I appreciate the opportunity to testify here today and would be happy to answer any questions you might have now or in the future, or to provide additional information if requested.

1.¹ 16 U.S.C. § 803j(2) does provide FERC with a process and criteria that it must follow if it determines that recommended conditions will be inconsistent with the purposes and requirements of the Act.